Supreme Court, U.S.
FILED
JAN 29 1998
CLERK

(3)

No. 97-1034

In The

Supreme Court of the United States

October Term, 1997

DANIEL E. CARPENTER,

Petitioner,

vs.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

At bottom, this case boils down to the plain meaning of a stipulation of dismissal entered in Massachusetts state court which stated that the parties (Petitioner and Respondents):

> hereby stipulate that the above matter is dismissed *with prejudice* as to [Petitioner] Daniel E. Carpenter and is dismissed *without prejudice* as to [other unrelated defendants].

(App. A at 4a) (emphasis in original).

Notwithstanding this clear and unambiguous language, which was drafted by Respondents' own attorneys (App. C at 31a), the Respondents nevertheless filed the *exact* same claims against Petitioner in a subsequent New York federal court action.

In an attempt to obfuscate what is really a simple issue, the Respondents resort to blatant and egregious misrepresentations of the record below. Among the many misrepresentations asserted by the Respondents are the following patently false statements:

> 1. The parties' attorneys reached an "agreement" that the Massachusetts action would be discontinued in favor of the third-party complaint pending in New York federal court.[1]
>
> 2. Petitioner made no objection to dual claims proceeding in two different forums for six months between the time Respondents asserted their claims against Petitioner in the federal action and the time the parties filed the Massachusetts state court stipulation of dismissal.[2]

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1. Opp. to Pet. 1.

2. Opp. to Pet. 7.

> 3. Petitioner never "objected" on the grounds of *res judicata* to the continuance of the first federal court action during the 20-month period in which the first federal action was pending without any decision by the District Court.[3]

Respondents' blatant misrepresentations of the undisputed procedural facts below and their reliance on the doctrine of "claim splitting," when the doctrine is inapplicable here, is clear evidence of their unabashed efforts to concoct any set of facts and law to support their ludicrous arguments.

For these reasons, Petitioner respectfully suggests that not only should the Petition for *Writ of Certiorari* be granted, but that the Court should utilize its inherent powers under Rule 16(1) and issue a summary disposition on the merits reversing and vacating the Second Circuit's clearly erroneous ruling in this case that a judgment of dismissal "with prejudice" is not *res judicata*.

FURTHER REASONS FOR GRANTING THE WRIT

I. RESPONDENTS BLATANTLY MISREPRESENT THE RECORD.

Respondents have blatantly misrepresented the undisputed procedural record below in an attempt to manufacture a history of proceedings which would then arguably support their "claim splitting" theory. But the theory fails because its "factual" foundation is simply untrue.

First of all, there was never any "agreement" between counsel that the Massachusetts action would be discontinued in favor of the third-party complaint pending in New York federal court. Respondents make the outrageous assertion that

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3. Opp. to Pet. 2.

> the Massachusetts attorney for Respondents and Petitioner's attorney met several times, in and out of court, and agreed during those meetings that Respondents would discontinue their Massachusetts court action against Petitioner and continue with their New York third party action against Petitioner.[4]

This assertion is absolutely untrue. There was no "agreement." In fact, the District Court found exactly the opposite in that "the [Petitioner's] attorney . . . stated that he did *not* intend to limit the scope of the dismissal to Massachusetts only." (App. C at 30a) (emphasis added).

Second, Respondents assert that

> [b]etween March, 1993 and August 1993 Petitioner raised no formal objections to the fact that dual proceedings based on the same transactions were simultaneously occurring in Massachusetts state court and New York Federal Court.[5]

This assertion is also false. The record clearly shows that Petitioner moved to dismiss the Massachusetts state court action, not once but twice, while the first federal court action was pending.

Respondents filed their Massachusetts state court action against Petitioner in February 1993. In late March 1993, Petitioner (through one of his corporate affiliates) instituted the first federal court action against Respondents. A week later, on April 7, 1993, Respondents filed their third-party complaint against Petitioner in the federal court action "alleging essentially the same state-law breach of contract claims that [Respondents] had asserted in Massachusetts." (App. A at 4a). The stipulation dismissing the Massachusetts action

4. Opp. to Pet. 1.

5. Opp. to Pet. 1.

with prejudice as to the Petitioner was executed by the parties in July 1993 and entered on the Massachusetts state court docket on August 10, 1993. (App. C at 23a).

It is undisputed that on two occasions between March and August 1993, Petitioner moved to dismiss the Massachusetts action. On March 11, 1993, Petitioner filed a motion to dismiss the Massachusetts action on the grounds that the Massachusetts state court lacked personal jurisdiction over the Petitioner and that the complaint failed to state a claim upon which relief could be granted. A month later, on April 19, 1993, Petitioner filed an amended motion to dismiss the Massachusetts state court action on the grounds of *forum non conveniens*. Therefore, Respondents' assertion that

> Petitioner made no objection to dual claims proceeding in the two different forums for the six months between the time Respondent [sic] asserted their claims against Petitioner in the Federal action and the time the parties filed the Massachusetts state court Stipulation of Dismissal,[6]

is absolutely untrue. It is true, however, that the Respondents did not prosecute their third-party complaint in the first federal court action for almost two years.

In fact, the Respondents filed a motion to stay the Massachusetts action while the first federal court action was pending, on the grounds that the federal action would be decided quickly and that the exact same claims then pending in Massachusetts were also pending in the third-party complaint then pending in New York federal court. *The Petitioner, however, filed a formal opposition to that stay motion in the Massachusetts state court on June 15, 1993.*[7]

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6. Opp. to Pet. 7.

7. *See* Joint Appendix produced in Second Circuit (Jt. App. at 158-60).

Third, Respondents assertion that Petitioner never "objected" on the grounds of *res judicata* to the continuance of the first federal court action during the 20-month period in which the first federal action was pending (without any decision by the District Court) is also false. In fact, Petitioner "objected" to the existence of the third-party complaint and raised the *res judicata* defense as soon as the litigation regarding the third-party complaint recommenced in the District Court.[8]

The only plausible explanation for the Respondents resorting to such blatant misrepresentations of the undisputed procedural record in this case is that the only way their "acquiescence" argument has any merit is if, in fact, the Petitioner "acquiesced" to having simultaneous suits on the exact same claims proceed in both Massachusetts and New York. But since the record clearly shows that no such "acquiescence" existed, Respondents' entire legal position evaporates into thin air.[9]

Finally, the Respondents even misrepresent the Second Circuit's holding in this case. The Second Circuit did *not* hold that "the Stipulation of Dismissal was ambiguous."[10] Rather, the Second

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8. *See* Petitioner's surreply to summary judgment motion (Jt. App. at 91-100). This surreply became moot because the District Court ultimately dismissed the third-party complaint for lack of subject matter jurisdiction. (App. C at 24a). Furthermore, none of the procedural activity during the 20 months focused on the third-party complaint.

9. Respondents' blatant misrepresentation of the undisputed procedural record below is puzzling, particularly since clear evidence of the procedural record in these cases exists in plain view in the Joint Appendix produced in the Second Circuit. *See* Petitioners' first motion to dismiss the Massachusetts action (Jt. App. at 144-45), amended motion to dismiss the Massachusetts action (Jt. App. at 146-47), and opposition to Respondents' motion to stay the Massachusetts action (Jt. App. at 158-60). In fact, Respondents (appellants below) should be particularly knowledgeable of the contents of the Joint Appendix, since it is they who prepared it.

10. Opp. to Pet. 3.

Circuit ruled that Massachusetts law, not federal law, should be applied. (App. A at 9a).

The Respondents have not only misrepresented the undisputed procedural history of this case, but they have also lost the sole underpinning of their "acquiescence" argument. The Petitioner clearly did not "acquiesce" to the existence of two suits pending simultaneously and, in fact, filed three formal pleadings in the Massachusetts state court action which objected vociferously to the existence of the Massachusetts action. The documents supporting these pleadings were hundreds of pages long, so it is not as if Respondents merely "forgot" that these pleadings were filed.

II. "CLAIM SPLITTING" DID NOT OCCUR IN THIS CASE.

Not only have the Respondents misrepresented the procedural record, but the lone case cited to support their flawed theory does not even fit the facts of the case at bar.

Although it is true that "[a] party can waive res judicata by consenting to split the claim into two suits," *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir.), *cert. denied*, 510 U.S. 1011 (1993) (citing Restatement (Second) of Judgments § 26 cmt. a), a party's consent must actually exist and "a defendant consents or acquiesces when he fails timely to object." *Calderon Rosada v. General Elec. Circuit Breakers*, 805 F.2d 1085, 1087 (1st Cir. 1986).

Although Respondents rely entirely on *Calderon Rosada* to bolster their "claim splitting" theory, *Calderon Rosada* is simply inapplicable to the case at bar because the defendant in that case did not object to the plaintiff dismissing her state case and proceeding exclusively in federal court. By contrast, however, Petitioner formally objected not once, not twice, but *three times*

during the pendency of the Massachusetts action for that case to be dismissed and/or not stayed.

Furthermore, in *Calderon Rosada*, there was substantial evidence of an actual agreement between the parties to dismiss the state action and proceed in federal court. There is no such agreement here.

Finally, claim splitting is usually not permitted, and *Calderon Rosada* was an exception to the rule based on express and open acquiescence. In the present case, not only is there no agreement, there is no acquiescence (either express or implied).

In contrast, an example of how claim splitting really works is the case of *Kendall v. Avon Products, Inc.*, 711 F. Supp. 1178 (S.D.N.Y. 1989). In *Kendall*, separate state and federal court proceedings alleging the same claims were initiated by the plaintiff within two months of each other. However, the court denied the defendant's *res judicata* defense because the "defendant did not at any time in either action object to plaintiff's claims on the basis that another action was pending based on the same claim." *Id.* at 1182.

The case at bar is clearly distinguishable from *Kendall* in that the undisputed record here clearly shows that Petitioner moved to dismiss the Massachusetts action *after* the Respondents filed their third-party complaint in the New York federal court action alleging the *exact* same claims that were then pending in Massachusetts.

The truth of the matter is that Petitioner was "winning" in Massachusetts, and ultimately did win in that the Massachusetts action was dismissed pursuant to *forum non conveniens* after the stipulation was entered (the Massachusetts court not being aware of the stipulation's existence).[11] In contrast, the District Court judge

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11. Jt. App. at 161.

then overseeing the first federal action stated that the most Petitioner's corporate affiliates might win in the trademark claims was nominal damages. Thus, it would be totally absurd and make no sense for Petitioner to dismiss in Massachusetts *only*, where he was winning, in order to face an uncertain (and nominal) outcome in New York.

Notwithstanding Respondents' desperate attempts to pigeonhole the facts of this case into those found in *Calderon Rosada*, Petitioner formally objected to the Respondents' attempts to "split" their claims then pending against him in Massachusetts and New York. As such, the doctrine of "claim splitting" does not apply in this case.

III. FULL FAITH AND CREDIT IS NOT A STATE LAW ISSUE.

Respondents' attempts to characterize the Second Circuit's erroneous decision as one encompassing solely Massachusetts state law issues is as unavailing as their "claim splitting" argument.

After peeling away the obfuscation inherent in Respondents' arguments, the bottom line in this case is that the Second Circuit failed to give full faith and credit in a New York federal court to a Massachusetts judgment which dismissed claims against the Petitioner "with prejudice." Such an issue has absolutely nothing to do with state law, and everything to do with federal constitutional and statutory principles of full faith and credit.

In fact, just this month the Court reaffirmed how important the Full Faith and Credit requirement is with respect to judgments in *Baker v. General Motors Corp.*, __ U.S. __, 1998 WL 7072 (U.S. Mo., Jan. 13, 1998). Making a distinction between laws and judgments, the Court held that

> [r]egarding judgments, however, the full faith and

> credit obligation is exacting . . . For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.

Id. at *7 (footnote omitted).

Petitioner had claims against him dismissed in Massachusetts "with prejudice" pursuant to a valid and final judgment entered in Massachusetts state court. He has now been sued again on those same *exact* claims in a word-for-word verbatim complaint in New York federal court by the same plaintiffs. This is a clear violation of the full faith and credit obligation. *See Baker* at *10, n. 12 ("If the [Respondents] had been parties to the [Massachusetts] proceedings and had actually litigated the [merits], the [Respondents] would of course be precluded from relitigating that issue in [New York].").[12]

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12. Respondents also assert that Petitioner somehow "waived" his *res judicata* defense in the second federal action by allegedly delaying in raising it in the *first* federal action. However, the District Court long ago dealt with this issue (also part of the procedural record), holding that

> it is irrelevant whether or not the [Petitioner] raised any affirmative defenses in the previous federal action because that action was dismissed for lack of subject matter jurisdiction. In any event, the [Respondents] had adequate notice of the res judicata issue.

(App. C at 27a). Similarly unavailing is the Respondents' assertion that the current federal action is somehow a "continuation" of the first federal action. *See* Opp. to Pet. 8, n.1. There is no such thing as a "continuation" of a previously dismissed action.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition for *Writ of Certiorari* and, in addition, utilize its inherent powers under Rule 16(1) and issue a summary disposition on the merits reversing and vacating the Second Circuit's clearly erroneous ruling in this case.

Respectfully submitted,

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